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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners*,

v.

GEORGE W. BUSH, ET AL., *Respondents*.

KHALED A.F. AL ODAH, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICI[1]

This case raises the question of whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), in combination with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 ("DTA"), constitutes an unconstitutional suspension of the writ of habeas corpus by limiting access to federal courts by persons detained by the United States at the Unites States Naval Base in Guantánamo Bay, Cuba ("Guantánamo"). *Amici curiae* are professors of legal history at law schools and universities in the United States, England and Australia with expertise in English legal history prior to 1789 and/or early American legal history. *Amici curiae* have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus that, under this Court's precedents, is properly considered in evaluating the issues raised under the Suspension Clause of the United States Constitution.

SUMMARY OF ARGUMENT

Amici wish to clarify two points bearing on this Court's analysis of the constitutionality of the MCA[2]: the availability of habeas corpus and the nature of habeas review

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[1] A list of *amici curiae* is provided in the Appendix. *Amici* have no personal, financial, or other professional interest, and take no position respecting any other issues raised in the cases below, including the merits of the underlying claims for relief of each detainee. All parties have consented to the filing of this brief, proof of which has been lodged with the Court. This brief was not written in whole or in part by any party, and no person or entity other than *amici* or their counsel made any monetary contribution towards the preparation or submission of this brief.

[2] Section 7(a) of the MCA amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

at common law. Historical evidence has long been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal habeas statute. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789."); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("for the meaning of the term habeas corpus, resort may unquestionably be had to the common law"). In this case, common law history from England and the United States shows that habeas corpus was available to petitioners regardless of their alienage, applied in places regardless of a territory's formal sovereign status, and ensured searching factual review to prevent illegal imprisonment and abuses of power.

Amici accordingly write to underscore the historical accuracy of this Court's recognition of the "writ's extraordinary territorial ambit." *Rasul v. Bush*, 542 U.S. 466, 481 n.12 (2004); *see also* Brief of Legal Historians (Jan. 14, 2004) filed in *Rasul v. Bush* and *al-Odah v. United States* (Nos. 03-334, 03-343), available at 2004 WL 96756. Disregarding *Rasul*'s analysis of the historical reach of the writ, the District of Columbia Circuit held in the present case that "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007); *see also* Gov't Br. Opp. Cert. at 9, 14. That contention misconstrues the nature of the common law writ of habeas corpus, which turned neither the petitioner's alienage nor on the petitioner's location within or without sovereign bounds. To the contrary, history demonstrates that the writ's primary function was to ensure the legal behavior of any agent acting pursuant to the Crown's authority in territory over which the Crown exercised *de facto* control. Thus, habeas applied whenever the jailer operated pursuant to the Crown's authority, regardless of the petitioner's

alienage and regardless of the sovereign status of the territory in which he was detained.

Amici also write to correct the government's assertion that common law courts sitting in habeas jurisdiction were barred from considering facts beyond those contained in the jailer's return. Gov't Br. Opp. Cert. at 12. The so-called "rule" against controverting the truth of the return, invoked here by the Government, existed primarily to protect the role of the jury—and thus lost its vigor outside of the post-conviction criminal context. In cases of executive and other non-criminal detention, courts employed a variety of procedural mechanisms to permit the admission and consideration of facts beyond the face of the return. Far from the "particularly deferential military context" claimed by the Government, *Id.* at 14, English and American courts were especially vigilant in protecting individuals detained by military authorities, and regularly engaged in independent factual inquiry to ensure that those individuals were not detained unlawfully.

ARGUMENT

I. AT COMMON LAW, HABEAS CORPUS JURISDICTION FOLLOWED THE JAILER, NOT THE DETAINEE, TO ANY TERRITORY UNDER THE *DE FACTO* CONTROL OF THE CROWN.

In *Rasul*, this Court found that since "[t]here was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown," the application of habeas corpus to "persons detained at the [Guantanamo Bay] base is consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481-82 (quoting *R. v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)). The lower court, nevertheless, concluded that "[t]he short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have

been available in 1789 to aliens without presence or property within the United States." *Boumediene*, 476 F.3d at 990. *Amici* maintain that the lower court misconstrued the principles governing the reach of the common law writ.[3]

A. Courts exercised common law habeas jurisdiction regardless of a petitioner's alienage.

The Great Writ's authority was rooted in the King's prerogative to ensure that officials delegated to discharge the power of the Crown, especially jailers, were not abusing that power. *See* SIR MATTHEW HALE'S THE PREROGATIVE OF THE KING 228-29 (The Publications of the Selden Society, vol. 92) (Yale, D.E.C., ed., London: Bernard Quaritch, 1975)(hereinafter "HALE'S PREROGATIVES") ("The gaols are all in the king's disposal...for the law hath originally trusted none with the custody of the bodies of the king's subjects...but the king or

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[3] *Amici* refer throughout to the common law writ of *habeas corpus ad subjiciendum*, developed in the sixteenth century, "chiefly to protect subjects against unconstitutional imprisonment by privy councilors and officers of state." J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 126 (2d ed. 1979). Habeas corpus was written into statute with the Habeas Corpus Act of 1679, but judges had been issuing the writ on purely common law grounds at least a century prior. *See* H. Nutting, *The Most Wholesome Law: The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527-43 (1959-60). For the next two centuries, the common law writ remained the primary means of challenging noncriminal forms of confinement by state and private actors because the famed statutory writ of the Habeas Corpus Act of 1679 applied only to criminal matters. *See* W. Holdsworth, 9 A HISTORY OF ENGLISH LAW 117-18 (2d ed. 1938); R.S. Walker, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 82-83 (1960). The importance of the common law writ can be seen in *Aylesbury's Case* (1696), in which the court, despite finding that petitioner was not bailable under the Habeas Corpus Act, "thought it therefore very just and reasonable to bail him, not as an act of duty to which they were obliged by the statute, but as a discretionary act, which was in their power by the common law." P.D. Halliday & G.E. White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, at 32 n.90 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252.

such to whom he deputed it.").[4] Because common law habeas attached to the wrongs of the jailer, not the rights of the petitioner, the availability of the common law writ was unrelated to the petitioner's nationality or alienage.

Thus, habeas corpus was traditionally available to all manner of aliens detained in the King's jails or otherwise subject to the King's authority. *See, e.g., Somersett's Case*, 20 How. St. Tr. 1, 79-82 (K.B. 1772) (releasing on habeas African slave purchased in Virginia and briefly detained on English soil pending voyage to Jamaica); *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (reviewing habeas petition of "native of South Africa"

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[4] The term "subject," as used by Hale and his contemporaries, arises in a specific historic context and cannot be equated with modern notions of a nation's "citizens." In his dissent in *Rasul*, Justice Scalia makes this common mistake. 542 U.S. at 501-02 (Scalia, J., dissenting) (arguing that "there would be habeas jurisdiction over a United States *citizen* in Guantanamo Bay," but that writ's historic reach would not encompass others, because "Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to *subjects*.") (emphasis added). Subjecthood was a more fluid and permeable category than present-day American citizenship: mere physical presence within territory under *de facto* English control could subject a person to the King's authority. HALE'S PREROGATIVES, at 56 ("Every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection"); *see also* W. Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 358 (1769) (citing Hale for proposition that "[l]ocal allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection. . ."). The closest eighteenth century analog to Justice Scalia's phrase "non-citizen" is not non-"subject," but rather "alien." *Id.*, 1 COMMENTARIES 354 ("The first and most obvious division of the people is into aliens and *natural-born* subjects. *Natural-born* subjects are such as are born within the dominions of the crown of England ... and aliens, such as are born out of it.") (emphasis added). "Alienage" was not a basis for barring access to habeas corpus. *See* discussion *infra* at 5-8. The proper historical use of the term "dominion" (which was a descriptive term rather than a term of art or formal territorial classification) is discussed *infra* at note 13.

allegedly held against her will in England). *Cf. Rasul*, 542 U.S at 481-82 & n.11.[5]

Similarly, prisoners of war and alleged enemy aliens[6] could challenge the legality of their detention by way of habeas corpus. Even where in these cases courts ultimately declined to discharge the petitioner, they reviewed the basis for the prisoner's detention on the merits. *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779). Manuscripts[7] underlying *DuCastro's Case*, 92 Eng. Rep. 816 (K.B. 1697), show that the King's Bench issued a writ for Daniel Ducastro and Francis La Pierre, "alien enemies and spies." The court bailed petitioners over counsel's arguments that petitioners' status as foreigners disentitled them from access to habeas, and ultimately discharged the men. Halliday &

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[5] Habeas petitions from the late eighteenth century show that alienage might itself be a cause for discharge. The Royal Navy frequently press-ganged merchant sailors, including aliens, into serving on warships. *See generally*, N. A. M. Rodger, THE WOODEN WORLD: AN ANATOMY OF THE GEORGIAN NAVY 164-88 (1986). Many petitioners were able to secure discharge on the ground that aliens were ineligible for impressment. *See, e.g., Hans Anderson, et al.*, The National Archives, London (Kew) [PRO], ADM1/3680, folio 478 (K.B. 1778) (ordering two Danes impressed into the Royal Navy released on habeas corpus); *Jacob Lilliquest, et al.*, PRO, ADM1/3678, folios 123, 137 (K.B. 1759) (holding a English ship captain in contempt for ignoring previous court order to release a foreigner impressed upon his ship); *Booy Booysen [sic] and John Jurgenson Brandt*, PRO, ADM1/3677, folio 262 (K.B. 1758) (granting habeas release to two Danes impressed on the Princess Royal).

[6] In the English context, an enemy alien was defined was an individual native to a country in a declared war with England. *See, e.g.*, Blackstone, *supra*, 2 COMMENTARIES 401. All other aliens were "alien friends." *Id.* at 1 COMMENTARIES 360. Similarly, in the American context, the definition of an enemy alien has always been limited to nationals of a foreign government against which the United States had declared war. *See* Alien Enemies Act of 1798, ch. 66, § 1, 1 Stat. 577.

[7] Manuscripts provide an important supplement to seventeenth and eighteenth century printed reports. *See* J.H. Baker, *Why the History of English Law has not been Finished*, CAMBRIDGE L.J. 74, 82 (2000). *Amici* are prepared to provide the Court with copies of any of the manuscripts cited herein.

White, *supra*, at 27 n.72 (citing KB21/14, ff. 70v. and 72v., PRO, KB16/1/6 (teste 23 January 1697)).[8]

Early American courts likewise exercised jurisdiction over habeas claims filed by or on behalf of aliens. *See, e.g., Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813) (Story, J., on circuit) (discharging Portuguese sailors imprisoned for desertion upon holding that American desertion laws only applied to American ships); *Rasul*, 542 U.S at 481-82 & n.11. American courts also exercised habeas jurisdiction over claims filed by or on behalf of aliens alleged to be enemy aliens or prisoners of war. In *Lockington's Case*, for example, the Pennsylvania Supreme Court considered the habeas petition of an Englishman imprisoned as an enemy alien during the War of 1812.[9] Bright (N.P.) 269 (Pa. 1813). The court held that it had jurisdiction to hear the petition and considered at length whether the statute authorized the marshal to detain Lockington, concluding ultimately that it did. *Id.* at 301. Even the dissent agreed that an alleged enemy alien might receive habeas review, to determine whether the petitioner was in fact an enemy alien. *Id.* at 298-99 (Brackenridge, J.).

In sum, both English and American courts exercised jurisdiction over habeas corpus claims regardless of the alienage of the petitioner. This jurisdiction, moreover, was exercised even where the petitioner was alleged to be an enemy alien during time of war.

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[8] Even outside the habeas context, English courts that did not have the power to provide relief to enemy aliens nonetheless had jurisdiction to determine whether the petitioner before them was in fact an enemy alien. *See, e.g., Sylvester's Case*, 87 Eng. Rep. 1157 (K.B. 1703) (holding that a Frenchmen could challenge his designation as an enemy alien and thereby gain access to English courts). *Accord Sparenburgh v. Bannatyne*, 126 Eng. Rep. 837, 840-41 (C.P. 1797).

[9] Although Lockington's petition was brought under a state statute, the disposition of his case demonstrates the general understanding of habeas corpus jurisdiction at common law in America. *See* G. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 993 (1998).

B. Courts exercised common law habeas jurisdiction regardless of formal territorial sovereignty.

As this Court has recognized, at common law the writ of habeas corpus had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 n.12 (internal quotation marks omitted). Courts exercised jurisdiction over the habeas petition of any person detained within territory under the Crown's *de facto* control, regardless of whether the territory was under the Crown's formal sovereignty. *Id.* at 481 ("[T]he reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."). This Court's conclusion in *Rasul* is fully supported by the historical record, and *amici* are unaware of any case before 1789 in which the common law writ of habeas corpus was held *not* to extend to any territory over which the Crown exercised sufficient power and control to enforce it.

1. Habeas writs issued directly by the King's Bench in Westminster to persons detained outside the realm of England.

Cases dating from the early seventeenth century through the late eighteenth century demonstrate the gradual expansion of the territorial ambit of habeas corpus. As discussed above, the writ was used throughout this period to ensure that no jailor acting in the name of the King was exempted from the scrutiny of the King's courts of law. *See* Blackstone, *supra*, 3 COMMENTARIES 131 ("[F]or the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, *wherever* that restraint may be inflicted.").[10]

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[10] *See* discussion of the term "subject," *supra* at n.4.

Throughout the seventeenth century, English courts issued common law habeas writs to so-called "exempt jurisdictions" – territories which, because of ancient privileges predating their acquisition by the English crown, maintained their own local courts of law.[11] Despite royal charters exempting these territories from general judicial oversight by the central English courts, the common law writ of habeas corpus still ran.[12] Sir Matthew Hale noted the importance of the writ's broad territorial reach "partly in respect of the interest the king hath in his subject, partly in respect there is no other means to examine whether his commitment be legal." HALE'S PREROGATIVES, at 207.

Throughout the eighteenth century, habeas corpus continued to reach exempt jurisdictions and distant sites subject to *de facto* English control. Lord Mansfield, writing his 1759 decision in *R. v. Cowle*, cited to a successful habeas action brought in 1601 by one Henry Brearly in Berwick-on-Tweed, an exempt jurisdiction on the Scottish-English border outside the formal realm of England, and declared that "[w]rits . . . such as writs of . . . habeas corpus . . . may issue to every dominion of the Crown of England. There is no doubt as to the power of this court, *where the place is*

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[11] These territories included Berwick-on-Tweed, the Isle of Man, the Channel Islands, the Cinque Ports and Palatinates such as Durham. *See* Blackstone, *supra*, 3 COMMENTARIES 79.

[12] *See, e.g.*, *Brearly's Case*, PRO, KB21/2, fols. 84v, 87 & 95 (K.B. 1600-1601) (writ issued to Berwick-upon-Tweed, exempt jurisdiction on the English-Scottish border) (cited in *R. v. Cowle*, 97 Eng. Rep. 587 (K.B. 1759)); *Bourn's Case*, 79 Eng. Rep. 465 (K.B. 1619) (writ issued to Dover, a Cinque Port town); *Jobson's Case*, 82 Eng. Rep. 325 (K.B. 1626) (writ issued to Durham, a County Palatine; writs previously issued to Calais and Bordeaux as early as fourteenth century). As the Court noted in *Rasul*, in the decades following the passage of the Habeas Corpus Act of 1641, English courts continued to exercise their common law jurisdiction over habeas claims from petitioners detained outside England. *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Isle of Jersey) and *R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669). *See also Anonymous*, 86 Eng. Rep. 230 (K.B. 1681).

under the subjection of the Crown of England."[13] 97 Eng. Rep. at 599. Thus, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus." *Rasul*, 542 U.S. at 482 (quoting *Cowle*).

Efforts to create enclaves beyond judicial reach were seen as affronts to the rule of law. In 1667 the Earl of Clarendon was impeached and charged with attempting to undermine the judicial exercise of habeas corpus by sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." *See Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II. A.D. 1663-1667*, 6 STATE TRIALS 291, 330, 396 (1668). In the present case, the circuit court interpreted the "Clarendon Affair" as an example of the unavailability of habeas corpus to detainees held in certain locations. *Boumediene*, 476 F.3d at 989-90. However, Clarendon's prisoners were prevented from enjoying "the benefit of the law" *not* because their territorial location was beyond the jurisdiction of English courts, but rather because those courts were prevented from exercising their proper jurisdiction at common law by the very communication and transportation problems created by Clarendon's actions – actions that Parliament held to be

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[13] "[E]very dominion of the Crown of England" refers to every territory under the control of the English Crown. "Dominion" understood in its historical context is not a legal category of land-holding – colonies, protectorates and dependent territories have all been described as dominions – but rather an expressive term implying the breadth of the Crown's reach, applicable to any locale under the *de facto* control of the English Crown. *See generally* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "dominion" as "[t]he territory owned by or subject to a king or ruler, *or* under a particular government or control, *esp. a country outside England or Great Britain* under the sovereignty of *or owing allegiance to the English or British Crown*") (emphasis added).

treasonous.[14] The lower court's reading turns the historical record on its head: the Clarendon Affair does not prove the limits of the common law reach of habeas corpus; on the contrary, it demonstrates that creating enclaves of unreviewable executive detention is antithetical to the very purpose and history of the Great Writ.[15]

The Framers of the United States Constitution, steeped in English law, drew upon the common law framework in drafting the Suspension Clause. That framework was shaped by the learned opinions of Hale and Blackstone, by precedents such as *Brearly* and *Cowle*, and

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[14] Parliament also responded to the Clarendon Affair with the Habeas Corpus Act, 31 Car. 2, c. 2, passed in 1679, that reinforced the common law understanding that habeas had a broad territorial scope, removed any doubt that a court's jurisdiction to issue the writ extended to detentions overseas, and made it a separate offence to remove detained persons to "Scotland, Ireland, Jersey, Guernsey, Tangier, or into Parts, Garrisons, Islands or Places beyond the Seas, which are or at any time hereafter shall be within or without the Dominions of his Majesty." 31 Car. 2, c. 2, Sects. XI-XII (emphasis added).

A century later, Sir Robert Chambers, successor to Blackstone as Vinerian Professor of English Law at Oxford (and who later became a Justice of the Supreme Court of Judicature at Calcutta, *see infra* at note 19), argued that despite the practical complications of enforcement, habeas corpus was still the most effective legal recourse for those held, as Clarendon's prisoners had been, in extra-territorial detention. "Yet cases have formerly happened of persons illegally sent from hence and detained there in which a writ of habeas corpus would be the properest and most effective remedy." Sir R. Chambers, LECTURES ON ENGLISH LAW, COMPOSED IN ASSOCIATION WITH SAMUEL JOHNSON, 1767-1773 at 7, 8 (1986).

[15] Lord Mansfield expressed similar hostility to enclaves where executive detention could not be effectively reviewed by courts. In *Fabrigas v. Mostyn*, 20 Howell's State Trials 81 (K.B. 1775), a "native" of Minorca brought an action for false imprisonment and banishment against the English military governor, who claimed immunity. In rejecting the governor's sweeping assertion of absolute executive power, Lord Mansfield cautioned that "to lay down in an English court of justice such monstrous propositions as that a governor ... can do what he pleases . . . and is accountable to nobody – is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere." *Id.* at 231.

by reaction to the misadventures of Clarendon, all of which demonstrated that habeas prevented the establishment of prisons beyond judicial reach.

2. Habeas writs issued by English law courts located in overseas territories

English law courts established overseas, in a wide variety of territorial locations with differing gradations of allegiance to the Crown, possessed the power to issue the writ of habeas corpus. *See, e.g.*, Instruction Nos. 464 & 466, *in* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 334-38 (L. Labaree, ed. 1967) (providing instructions extending writ to Barbados in 1702, Bahamas in 1729, St. John in 1769, and Nova Scotia in 1749); F. Madden & D. Fieldhouse, THE CLASSICAL PERIOD OF THE FIRST BRITISH EMPIRE, 1689-1783 at 450 n.2 (1985) (regarding extension of writ to Jamaica in late eighteenth century).

English courts in India, which provide a useful analogy to the case at bar, also had authority to issue writs of habeas corpus. Established by the Crown to ensure that the East India Company complied with the common law,[16] these courts had jurisdiction over an area that was not sovereign territory belonging to the Crown but nonetheless was under

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[16] After Parliament passed the Regulating Act of 1773 to oversee the administration of the East India Company, a royal charter established a Supreme Court of Judicature at Calcutta with jurisdiction that included Bengal, Bihar, and Orissa and which had the "full power and authority" to adjudicate "all complaints against any of his majesty's subjects for any crimes, misdemeanors or oppressions" in a manner similar to the King's Bench. 13 George III, §14. The Court took seriously its responsibilities to check abuses by the East India Company, as evidenced by Chief Justice Impey's warning to the Company's Governor General: "Though the natives without question are under your general protection, they are more immediately so under that of the laws. One great end of the institution of our court is their protection, particularly against British subjects vested with real or pretended authority." Chief Justice Sir Elijah Impey, Letter to the Governor General and Council of the East India Company, BL, MS Add. 16,265 (Impey Letterbook 1774-76) f29v (25 May 1775).

de facto English control. M.P. Jain, OUTLINES OF INDIAN LEGAL HISTORY 83-137 (1952).[17] Further, habeas reached into India not through a specific statutory grant, but through the common law.[18]

The Supreme Court at Calcutta's jurisdiction over habeas claims was not limited by the petitioner's alienage as long as the jailer in question was operating under the authority of the Crown or a Crown-chartered organization. As stated by Justice Robert Chambers of the Supreme Court at Calcutta, "I conceive every man in these provinces, whether subject to our jurisdiction or no, to be entitled to a *habeas corpus*, upon ... reason to believe that he is imprisoned without any just cause, *by a person employed by the East India Company.*" *Cumall a Deen Ally Khan v. Charles Goring*, BL Add. MSS 38,400 folio 84 (Sup. Ct.,

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[17] Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the East India Company until 1813. 4 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 605 (Dodwell, H.H. ed. 1929) ("Down to [1813] the British assertion of sovereignty within the Company's possessions had been spasmodic and incomplete.").

[18] Habeas corpus is not mentioned the Regulating Act, and a subsequent royal charter for the Supreme Court of Judicature at Calcutta enumerated the Court's power to issue writs of "mandamus, certiorari, procedendo and error" but not habeas corpus. "Charter for Erecting a Supreme Court of Judicature at Fort William, in Bengal," of March 1774, in A COLLECTION OF STATUTES...AND AN ABRIDGEMENT OF THE COMPANY'S CHARTERS (1794), Appendix, p.1. The Court was able to implement the common law, however, and it was in the common law that habeas power resided. "The powers of Justice of the Court of King's Bench at common law are given severally and respectively to the Judges of this Court; and as (according to Blackstone) the Judges of the King's Bench used to issue writs of *habeas corpus* severally, we have agreed that we have severally authority to issue the writ." *R. v. Ramgovind Mitter*, Ind. Dec. (O.S.), I, 1009 (Sup. Ct., Calcutta, 1781) (Chambers, J.). Even the Governor General of the East India Company, whose employees were the recipients of habeas writs issued by the Court, acknowledged the Court's jurisdiction, explaining to company directors that "the Court cannot avoid issuing such writs, if the complainants swear that the defendants are employed in the service of English subjects." Governor General Hastings, Letter to East India Company Directors, IOL/L/PARL/2/9, no.16, ff. 265-268 (25 Feb. 1775).

Calcutta 1775) (opinion of Chambers, J.) (emphasis in original) (ordering the release of a revenue collector detained by the East India Company for alleged late payments).[19] This court issued scores of habeas writs, including many for petitioners of Indian or other non-English alienage.[20] To the extent the limits of the Supreme Court at Calcutta's habeas jurisdiction were discussed, the question turned not on the formal territorial sovereignty of the site of detention, but on the competence of local courts. Only when a local court was competent to review and redress unlawful detention might the English court consider declining to exercise its common law habeas jurisdiction as a matter of comity.[21]

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[19] Robert Chambers (1737–1803) had a long and distinguished career as a legal scholar and jurist. He succeeded Blackstone as Vinerian Professor of English Law at Oxford, served as Principal of New Inn Hall, Oxford, and enjoyed a twenty-five year long tenure as a Justice (later Chief Justice) of the Supreme Court of Judicature at Calcutta. *See generally* T. Curley, SIR ROBERT CHAMBERS: LAW, LITERATURE AND EMPIRE IN THE AGE OF JOHNSON (1998).

[20] *See, e.g.*, *Case of Seroop Chund* (Sup. Ct., Calcutta 1781) (Lemaistre, J.), reported in REPORT FROM THE COMMITTEE TO WHOM THE PETITION OF JOHN TOUCHET AND JOHN IRVING, AGENTS FOR THE ENGLISH SUBJECTS RESIDING IN THE PROVINCES OF BENGAL...WERE SEVERALLY REFERRED (London, 1781), unpaginated, Appendix 9 (issuing writ to bail Indian jailed for failure to repay debt); *In re Coza Zachariah Khan*, 1 Morley Dig. 277 (Sup. Ct., Calcutta 1779) (issuing writ to Indian held in "a distant place" and ordering its return upon receipt); *Case of Bancha Ram* (Sup. Ct., Calcutta 1775), *in* THE JUDICIAL NOTEBOOKS OF JOHN HYDE AND SIR ROBERT CHAMBERS 1774-1798, entry of 13 Feb. 1776, 72 vols., R4073 ff., Victoria Memorial Hall, Calcutta (hereinafter "NOTEBOOKS") (describing writ issued to Indian detainees jailed by English authorities); *Case of Joseph Pavesi* (Sup. Ct., Calcutta 1776) *in* NOTEBOOKS (same, as to French national detained in Bengal). *See generally* N. Hussain, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 80-81 (2003).

[21] In *Case of Sanson* (Sup. Ct., Calcutta 1776), the four justices of the Supreme Court at Calcutta disagreed about the court's ability to discharge a French national ordered by a local Indian court to be held in an English-controlled jail on assault charges. *See* Curley, *supra* at 242-43, 593-94 n.61. Justice Chambers recommended deference to the local courts. *See* Sir. R. Chambers, Letter to Rt. Hon. Charles Jenkinson, *in*

Parliament recognized the application of the writ outside the realm of England to non-English aliens – that is, the use of habeas by Indian petitioners in India – even as it attempted to limit that application by statute. In 1781, at the behest of the East India Company, Parliament passed the Act of Settlement, which allowed jailers to defeat a petition for habeas corpus on behalf of a non-English alien by producing a statement from the Governor-General of the East India Company that the Company had authorized the detention. 21 Geo. III c.70; *see also* Jain, *supra*, at 122. However, the Act did not extinguish the Supreme Court's ability to exercise habeas corpus to "accommodate ... the religion and manners" practiced locally, which invited the Court to use habeas corpus to settle family disputes and to defend individuals held improperly on private or local authority rather than Company authority. 21 George 3, c. 70, s. 19; *see also* Halliday & White, *supra*, at 77-81. Throughout the end of the eighteenth century and into the nineteenth, English courts in India repeatedly used their habeas jurisdiction to do so.[22]

Liverpool Papers, Vol CCXII, East India Papers (Jan. 1778 – Jan. 1779) MS Add. 38,401 ff 28a-28b (1 Feb 1778). By contrast, Justices Hyde and LeMaistre thought the local courts were inferior to the English courts, and sought a fuller account of Sanson's detention before denying relief. Hyde, NOTEBOOKS, 16 and 22 Apr. 1776. Justice Lemaistre went so far as to suggest convening before the Supreme Court a trial, complete with witnesses, on the circumstances and legal merits of the detention. *Id.* Chief Justice Impey worried that the local courts would not heed the Supreme Court's ruling, and that Sanson's case was "not amenable to us." *See* Liverpool Papers, Vol CCXII, East India Papers (Jan. 1778 – Jan 1779) MS Add. 38,401 ff 28a-29b, Sanson ultimately escaped, mooting the case before the court could issue a decision. *Id.* at 30a (all reported in Curley, *supra*, at 242-43, 593-94 n.61. Nonetheless, Justice Hyde's position was borne out in subsequent cases, as the Supreme Court exercised habeas jurisdiction over local court systems. *See, e.g.*, B.N. Pandey, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 151 (1967) (discussing writ issued in 1777 on behalf of Indian arrested and confined without trial by local criminal court in Bengal, outside Calcutta).

[22] *See, e.g., In re Muddoosooden Sandell*, 2 Morley's Dig. 29 (Sup. Ct., Calcutta 1815) (issuing writ on behalf of mother against son); *Rajah*

In sum, the proceedings of English courts – whether sitting in London or in overseas territories, whether operating in permissive or restrictive statutory environments – demonstrate the broad territorial reach of habeas corpus. They show that the common law writ's availability did not depend on formal constructs such as sovereignty or on the alienage of the prisoner but instead extended to any territory where the crown possessed sufficient power and control to ensure the jailor's obedience to the writ's command.

II. The Writ Provided for Meaningful and Independent Judicial Inquiry Regarding the Factual Basis for Detention, Including Consideration of Additional Evidence.

The Government has asserted that habeas courts at common law "engage[d] in highly deferential sufficiency review" that precluded prisoners from contesting the facts alleged in the custodian's return. Gov't Supp. App. Br. at 51. That assertion is incorrect, as it ignores the difference between post-conviction criminal cases and other forms of executive or other non-criminal detention. English and American judges in the time surrounding the Founding routinely looked beyond the face of the return to ensure that individuals received meaningful judicial inquiry regarding the factual basis for their detention.

Mohinder Deb Rai v. Ramcanai Cur, 1 Morley's Dig. 277 (Sup. Ct., Calcutta 1794) (issuing writ and discharging Indian prisoner detained by order of provincial court). A separate supreme court established at Madras in 1801, *see* Jain, *supra*, at 125, likewise continued to issue writs of habeas corpus. *See, e.g.*, *R. v. Nagapen*, 1 Morley's Dig., 278 (Sup. Ct., Madras 1814) (writ issued on behalf of mother to obtain possession of her illegitimate infant unlawfully in putative father's custody); *R. v. Monisee*, 1 Morley's Dig. 278 (Sup. Ct., Madras 1810) (issuing writ to petitioners held outside Madras by local jailer).

B. A. At common law, judicial scrutiny was greatest outside the context of post-criminal convictions.

The Government's contention that common law courts were strictly bound by the four corners of the custodian's return (or response) to a habeas corpus petition is historically inaccurate. To the contrary, the general rule against traversing – or disputing – the facts asserted in the return applied primarily in post-conviction criminal cases.[23] While courts generally did not allow criminal detainees—who had already received a trial and a jury verdict—to contradict the facts stated in the return,[24] they commonly exercised independent review over the factual assertions of prisoners in cases of executive and other non-criminal detention that lacked the safeguards of a jury trial by considering additional evidence. J. Hafetz, *Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535-36 (1998). In cases arising out of "partially judicial, partially executive

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[23] This distinction is recognized by Dallin Oaks, despite his work having been cited prominently—and erroneously—by the Government. D.H. Oaks, *Legal History in the High Court--Habeas Corpus*, 64 MICH. L. REV. 451, 454 n.20 (1966) ("[W]ith respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were 'governed by a principle sufficiently comprehensive to include . . . most cases' so that it was impossible to specify those [non-criminal] cases in which it could not [be controverted].'") (quoting R.C. Hurd, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 270-71 (1858) (bracketed language and ellipsis in original).

[24] By contrast, courts entertaining habeas petitions of pretrial criminal detainees seeking bail often considered extrinsic factual evidence going to the legality of the arrest. *See, e.g., Crisp's Case*, 94 Eng. Rep. 495 (K.B. 1744) (in considering return of commitment on allegation of highway robbery, examining affidavits "containing very strong circumstances to show that the prisoner did not commit the fact" and entering *nisi* order to bail); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (granting bail for woman indicted for killing her husband after allowing her to introduce affidavits of fact showing malicious prosecution).

bodies, the writ moved yet closer to its role as a safeguard against the arbitrary power of the Crown itself." W.F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 80 (1980). *Accord* Baker, INTRODUCTION, *supra*, at 419 (observing that the expanded powers of summary conviction "infringed the principle that a man should only be judged by his peers, and . . . were regarded with deep suspicion by the superior judges"). To that end, English and American judges in the seventeenth and eighteenth centuries ensured that individuals challenging executive detention received meaningful and independent review of both factual and legal questions.

Full exploration of the Government's chief historical source for the general rule against traversing the return shows that its reliance is misplaced for two reasons. First, among leading English jurists in the mid-eighteenth century, there existed a multiplicity of views surrounding the effect of the return, and the rule against traversing the return was neither iron-clad nor the prevailing view among judges. Second, and equally important, even defenders of the rule against traversing the return permitted the introduction of facts in habeas cases by a range of other means.

The Government principally relies on a statement by Justice John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus*, 107 Eng. Rep. 29 (H.L. 1758), during the debate on the failed 1758 habeas corpus bill. Gov't Supp. App. Br. at 51. The bill would have extended certain procedural reforms available in criminal cases under the Habeas Corpus Act of 1679 to non-criminal cases and codified the common law practice of permitting the habeas petitioner to controvert facts stated in the return. 15 PARLIAMENTARY HIST. 871-74 (London, T.C. Hansard 1813). Wilmot opined that judges sitting in habeas were constrained by the return, except "by the clearest and most undoubted proof"—a jury verdict. 107 Eng. Rep. at 60.

Wilmot's view, however, was not commonly accepted. *See* J. Oldham & M. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 GEO. IMM.

L.J. 488, 495 (2002) (criticizing account contained in W. S. Holdsworth, 9 A HISTORY OF ENGLISH LAW 120 (reprint 1966)). Six of the twelve common law judges disagreed with Wilmot's views, and after the failure of the 1758 bill, an alternative bill drafted by the judges expressly permitted judicial examination into the truth of the facts alleged in the return. Oldham & Wishnie, *supra*, at 490. In particular, Justice Michael Foster, widely respected by his colleagues for his expertise in criminal law, stated of non-jury executive detention cases, "as they come not within the general reason of the law, [they] are not within the general rule." Letter, Justice Foster to Chief Baron Parker, 20 How. St. Tr. 1378 (cited in Hurd, *supra*, at 267 (1858)). Foster recognized that if denied the opportunity to controvert the truth of the facts claimed in the return, a man pressed into military service could be sent away far from any court without an opportunity to contest the deprivation of his liberty. In such circumstances, "he is absolutely without remedy" because "[a]n ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight." Oldham & Wishnie, *supra*, at 489 (citing M. Dodson, THE LIFE OF SIR MICHAEL FOSTER 57-62 (1811) (reprinting letter dated May 24, 1758). Thus, Wilmot's statement by no means represented a consensus viewpoint. R.J. Sharpe, THE LAW OF HABEAS CORPUS 66 (2d ed., 1989) ("[T]here was nothing like unanimity in favour of Wilmot's formulation of the common law rule. In fact, there would seem to have been a preponderance of judicial opinion which favoured a more liberal construction."). Indeed, prisoners detained without charge contested the facts in the return in "*most* ... cases." Oaks, *supra*, 64 MICH. L. REV. at 454 n.20 (emphasis added).

The judges' debate was narrowly focused on what happened after the return was made, not on the broader issue of whether habeas petitions were barred from introducing, or whether judges might request or consider, additional facts. 15 PARLIAMENTARY HIST., *supra*, at 872. At common law, a

jailer made a return only *after* the court issued the writ. A prisoner moved, or "petitioned," for a writ of habeas corpus. The court could immediately enter the writ, thereby calling for the jailer to make a return. Instead of immediately issuing the writ, however, the court could issue an order to show cause, or rule *nisi*, why the writ should not issue. *See infra*, at 22-23. At that stage of the proceedings, because the return had not been entered, both sides were able to contest the factual and legal basis of the detention. Thus, common law judges – including Lord Mansfield, who concurred with Wilmot that "the Writ of Habeas Corpus issues upon the return supposing the facts alleged to be true"[25] – employed a variety of procedural mechanisms to conduct a full judicial inquiry into the factual basis of non-criminal detentions, including the consideration of extrinsic facts.

C. Habeas corpus provided a flexible and powerful tool for judges to inquire into the factual and legal basis for a prisoner's detention.

Common law courts routinely considered evidence beyond the face of the return in non-criminal contexts such as impressments and private detentions. As one historian recognized, "courts have never really been prevented by the common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention." Sharpe, *supra*, at 70. *See also* G. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 (1998) (acknowledging that "[o]ne of the maxims of eighteenth-century habeas corpus practice had been that the petitioner could not controvert the facts stated in the return," but noting that the "general statement papered over exceptions"). Instead, by the eighteenth century, courts treated the so-called rule against controverting the truth of the return as essentially a procedural hurdle and reviewed

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[25] Oldham & Wishnie, *supra*, at 492 (citing Mansfield's own notes of the debates, Scone Palace MSS, Bundle 1352, unpublished manuscript).

additional evidence submitted by the prisoner if (1) the return was deemed insufficient; (2) prior to the entry of a return, the court issued a rule *nisi*, essentially converting the writ into an order to show cause; (3) the petitioner "confessed" to the facts contained in the return, which then permitted the introduction of additional factual allegations; or (4) the evidence pertained to jurisdictional facts, which often extended to the very core of the case and effectively vitiated the rule altogether. *See generally* Sharpe, *supra*, at 66-68, 72-73; Hurd, *supra*, at 267-71. In short, common law courts exercised an arsenal of mechanisms that formally preserved the respective roles of judge and jury in criminal cases while permitting judicial fact-finding in a wide range of cases of executive and other-non-criminal detention, where a prisoner had not received – and would not receive – the full panoply of protections provided in jury trials.

1. False or insufficient return

Courts did not hesitate to admit additional relevant information or even to conduct their own interview of witnesses and documents when a return appeared insufficient or false. Sufficiency of the return—a statement of the cause for detention and process given—was fundamental to preserving the integrity of the writ. *R. v. Winton*, 101 Eng. Rep. 51 (K.B. 1792) ("The courts always look with a watchful eye at the returns to writs of habeas corpus. The liberty of the subject so essentially depends on a ready compliance with the requisitions of this writ that we are jealous whenever an attempt is made to deviate from the usual form of the return."). Further, if the court had cause to believe a return was false—regardless of its adherence to legal form—the court permitted additional factfinding. *See Leonard Watson's Case*, 112 Eng. Rep. 1389, 1415 (K.B. 1839) (declining to establish blanket rule providing that custodian bear affirmative burden of demonstrating the veracity of the return, but permitting petitioner to demonstrate on traverse that the facts in the original return

were false and, upon such a showing, compelling jailer to explain the untruths in the original return or to provide further evidence of the return's veracity). Thus, in *Strudwick's Case*, 94 Eng. Rep. 271 (K.B. 1744), in response to a return that a prisoner was too sick to be produced in court, the court considered affidavits from both sides attesting to the prisoner's state of health. *See also Emerton's Case*, 84 Eng. Rep. 829 (K.B. 1675) (finding return insufficient on basis of affidavit attesting that petitioner's wife was still under respondent's custody).

2. Rule nisi: order to show cause

Perhaps the most common means of independent judicial fact-finding was to evade the return altogether. Upon receiving a motion for habeas corpus, the court issued a rule *nisi* in advance of a writ for habeas corpus. The jailer was ordered to show cause as to why the court should not issue the writ (which could be rebutted by the petitioner), instead of filing a return, which was presumptively binding. If the jailer was unable to show cause, the writ issued, and the petitioner had the advantage of the factual record already developed. In *R. v. Dawes*, 97 Eng. Rep. 486 (K.B. 1758), for example, Lord Mansfield "went minutely through the affidavits on both sides" on an order to show cause for the discharge of an impressed sailor, ultimately finding that the impressment was valid. In a parallel case, Lord Mansfield considered the case of a man who claimed he had been illegally conscripted into military service by force. On a rule *nisi*, the lawyers argued "upon the fact only," and the court, having taken "time . . . to look into the affidavits," ordered the petitioner's discharge. *R. v. Kessel*, 97 Eng. Rep. 486 (K.B. 1758).

Rules *nisi* commonly issued in private detentions as well. In *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761), the court discharged a woman contesting her confinement in a "mad-house" after ordering a medical inspection, reviewing that doctor's affidavit from the medical inspection,

and examining the woman, who appeared to be sane. In *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344-45 (K.B. 1810), the court considered multiple affidavits from witnesses and ordered an examination of a "native of South Africa" to assess whether she was confined against her will.[26]. These and numerous other examples demonstrate that courts employed the rule *nisi* procedure on habeas to consider new facts in determining whether the prisoner was lawfully detained.[27]

3. Confession and avoidance

Courts overseeing habeas proceedings also engaged in factual review by permitting detainees to "confess and avoid" the return, allowing the petitioner to admit the allegations in the return and then file a special pleading to matters that did not explicitly contradict the return, including

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[26] Contemporaneous news reports indicate that the court undertook lengthy factual inquiry in considering the habeas petition brought on behalf of the "Venus Hottentot," a woman from South Africa who was alleged to be held and exhibited to the public against her will. 104 Eng. Rep. at 344-45. Over two days of proceedings, the court considered affidavits of a businessman who had turned down an offer to buy the detainee and another person who had gone to the exhibition and attested in detail to the prisoner's apparent misuse. On this extrinsic evidence, the court ordered that the prisoner be brought forth to determine whether she was being kept against her will. LONDON TIMES at 3B (Nov. 26, 1810). The court conducted a three hour independent examination of the detainee, and ultimately decided against issuing the writ, based upon the detainee's own testimony that she was employed in accordance with her own will. LONDON TIMES at 3D (Nov. 29, 1810).

[27] *See* LONDON TIMES at 4A (Nov. 30, 1801) (reporting case of John Rogers, who was detained by doctor as insane person; noting that court considered several affidavits from numerous doctors and relatives on both sides of the issue, and ordered that the writ should enter, but only to provide a court-appointed investigator to examine Mr. Rogers at the asylum); LONDON TIMES at 3[illegible] Nov. 29, 1809) (reporting case of Tilley Mathews, whose relatives filed a petition when the governors of the hospital refused to release her; noting that the court considered multiple affidavits, and ordered hearing to consider "what additional evidence could be procured," including affidavits from the detainee's doctors).

additional facts not contained in the return. For example, in *Goldswain's Case*, 96 Eng. Rep. 711 (K.B. 1778), the court looked beyond the admiralty's return to a petition brought by a bargeman who had been impressed by the Admiralty despite being under the protection of the Navy-Board while carrying cargo for the King. The return made no mention of the claimed protections, but merely contained the statutory basis for impressment and the time and place Goldswain was taken. The court rejected the contention that it must defer to the admiralty's statement of the factual and legal basis for detention: "[W]e are not concluded by the return but the petitioner may plead to it any special matter necessary to regain his liberty." *Id.* The court then decided, on the basis of the additional factual evidence in the petitioner's special pleading submitted in response to the return, that he had been subject to protection by the Navy-Board and ordered his discharge. *See also Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (accepting the petitioner's affidavit stating that he was a ship-carpenter and thus entitled to an exemption from enlistment based on the petitioner's status as a freeholder); *Gardener's Case*, 79 Eng. Rep. 1048 (K.B. 1601) (ordering discharge based on petitioner's "confession" that he had possessed a handgun and additional submission that such possession was justified due to petitioner's status as deputy sheriff); Hurd, *supra*, at 353-61. "Confessing and avoiding" the return thus provided an important means of remedying unlawful detentions by enabling judges to consider existing evidence and to ensure there was adequate factual basis for executive and other non-criminal detentions.

4. Jurisdictional facts

Common law courts also frequently considered extrinsic evidence without resorting to any of the technical procedural mechanisms discussed above. These cases suggest that courts were willing to review jurisdictional facts—i.e., evidence showing that the detention in question was beyond the custodian's authority. Sharpe, *supra*, at 73

("[A]dmittedly, there can be little doubt that it is difficult to distinguish a jurisdictional fact from a non-jurisdictional one," but inferior courts and executive agencies would otherwise be permitted to establish the limits of their own powers, "and the courts have long considered that such unfettered powers would be intolerable with respect to the liberty of the subject."). In *Ex Parte Beeching*, 107 Eng. Rep. 1010 (K.B. 1825), for example, the court considered the legality of civil arrests under the Custom Act. The statute required that persons arrested under the statute be reviewed by justices of the peace residing near the place of arrest. The return alleged that petitioners were taken by their own consent to a jail more than 150 miles from their place of arrest. Justice Abbot stated that because the case arose under common law habeas, the effect of the return was an open issue. He observed that "[t]here is a very good reason for not permitting the truth of a return to be traversed where the person is charged with a crime, for that would be trying him upon affidavits," and thus usurping the role of the jury, but held that such reservations did not apply to the committing authority's jurisdiction, including the manner of arrest. *Id.*

In many instances, jurisdictional facts went to the heart of the case. Where the legality of detention turned on a factual requirement—such as enemy alien status or a factual basis for impressment— courts conducted an independent inquiry into the underlying facts, including evidence submitted by the prisoner, regardless of the return. Sharpe, *supra*, at 115-16 (habeas court will investigate whether detainee "is in fact and in law" an enemy alien or a prisoner of war). In *R. v. Schiever*, 97 Eng. Rep. at 551, a Swedish national challenged his detention as a prisoner of war. The court considered not only the affidavit of the petitioner, a Swedish sailor detained as a prisoner of war, but also that of Oluf Orundell, who was on board the privateer with the petitioner. *Id.* Though the court ultimately found that the petitioner was a prisoner of war, it considered extensive extrinsic evidence before doing so. *Accord Three Spanish*

Sailors, 96 Eng. Rep. at 775 (reviewing affidavits and bodies of petitioners before determining that petitioners "upon their own showing" were enemy aliens); *R. v. Marsh*, 81 Eng. Rep. 23 (K.B. 1688) (denying discharge of petitioner committed for piracy by admiralty following thorough review of all manner of evidence, including petitioner's own statements).

D. Early American courts continued the English common law tradition of conducting sufficient factual review to prevent illegal detention.

Early American courts similarly used the writ to remedy all manner of unjust commitment, even when doing so required factual inquiry beyond the face of the return. *R. v. Delaval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763), in which Lord Mansfield conducted a full factual inquiry into the case of a girl held against her will, has been noted as "probably the best known and most influential habeas corpus authority imported into the country with the common law." D.H. Oaks, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 271-72 (1965). Numerous examples from the Founding era confirm that judges routinely considered evidence beyond the face of the return, particularly in cases outside of the post-criminal conviction context. American courts, moreover, conducted fact-finding without resort to the formal procedural mechanisms used in England to consider additional evidence.

Chief Justice Marshall contemplated that courts sitting in habeas would review the decisions of committing magistrates for their adherence to core principles of due process by looking beyond the four corners of the return. In *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Marshall considered a habeas petition by two defendants who had been arrested on charges of treason and committed pending trial. The Court "fully examined and attentively considered" the "testimony on which [the prisoners] were committed," in the prisoners' presence, during proceedings that stretched

over five days. *Id.* at 125. Marshall made clear that it was the Court's responsibility to undertake a plenary examination of the evidence, which, he noted, "the court below ought to have done." *Id.* at 114. The Court discharged the prisoners due to insufficient proof of the "actual assemblage of men for the purpose of executing a treasonable design" which the crime of levying war against the United States required. *Id.* at 125-36; *see also Ex parte Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (describing examination of affidavits submitted by prisoner and witnesses).[28]

Previous executive process did not foreclose a factual inquiry by a court during habeas proceedings. For example, Chief Justice Marshall, sitting on circuit, considered both factual and legal issues in reviewing the commitment of a civil debtor by a municipal authority. *In re Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (Marshall, C.J., on circuit). At the hearing, counsel for petitioner presented two new documents—authentic copies of the petitioners' original accounts to refute the accuracy of return, and the underlying warrant. 20 F. Cas. at 242. The court pointed to the municipal authority's erroneous accounting to demonstrate that the flawed quasi-judicial process was illegal. While the court acknowledged that it could not order a reaccounting, it could order release, which it did. *Id.* at 25.

The executive detention of military deserters drew especial judicial scrutiny. Numerous cases indicate that courts "exercising their original habeas jurisdiction were not bound by the returns to their writs, but commonly conducted evidentiary hearings to examine the substantive legality of

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[28] State courts also routinely considered extrinsic evidence in cases of non-criminal detention to determine that there was an adequate factual basis for the prisoner's confinement. *See also State v. Cheeseman*, 5 N.J. L. 522, 525 (1819) (considering upon return testimony and affidavits from mother, child and alleged guardians, and refusing to turn child over to guardians over child's own desires); *Matter of Oakes*, 8 Monthly Law Reporter 122, 122 (Sup. Jud. Ct. Mass. 1845) (not reported) (cited in Oaks, 32 U. CHI. L. REV. at 267) (remanding after two-day evidentiary hearing that commitment of mentally ill petitioner was proper).

detentions." *See* E.M. Freedman, *Milestones in Habeas Corpus: Part I*, 51 ALA. L. REV. 531, 572-73 & n.130 (2000) (collecting cases). For example, the district court conducted a detailed factual inquiry into the petitioner's state of mind and determined that he "enlisted ... when he was wholly incapable of transacting business or understanding it by reason of intoxication," thus invalidating the legal basis for commitment. E.M. Freedman, RETHINKING THE GREAT WRIT OF LIBERTY 166 & n.56 (2001) (citing and discussing *Matter of Peters*, M-1215 (D.W. Tenn. Dec. 31, 1827)).[29] Thus, as in the English impressment cases, American military enlistment cases often turned on extrinsic evidence submitted in response to the return. *See, e.g.*, *State v. Clark*, 2 Del. Cas. 578 (Del. Ch. 1820) (discharging soldier based upon newly submitted evidence contradicting the return and showing that soldier was underage and intoxicated at time of enlistment).

Courts exercised the same independent and *de novo* factual inquiry regardless of the petitioner's alienage. In *Ex parte Cabrera*, 4 F. Cas. 964, 964-66 (C.C.D. Pa. 1805), a foreign diplomat submitted a petition to federal district court on the grounds that he was entitled to immunity from imprisonment under state law for debt, and supplied numerous documents in response to the return. The court agreed, finding that the newly submitted pieces of evidence "fully establish" that there was no lawful basis for his confinement. *Id.* at 966; *see also Commonwealth v.*

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[29] *See also Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812) (following the submission of a return from naval officers attesting to the legality of the enlistment of an alleged minor, consider testimony of minor's mother regarding his age, family history and whether or not she in fact gave consent); *State v. Brearly*, 5 N.J. L. 555 (1819) (in response to return on habeas petition brought by proprietor on behalf of minor apprentice enlisted in navy, considering prisoner's and petitioner's own testimony and parties' stipulation of certain facts). *Cf. United States v. Bainbridge*, 24 F. Cas. 946, 949-52 (C.C.D. Mass. 1816) (Story, J., on circuit) (deciding as matter of law that Congress could require enlistment of minors without parental consent, but recognizing that court otherwise would have entertained detailed affidavits on issue of consent).

Harrison, 11 Mass. R. 63 (1813) (en banc) (ordering discharge upon affidavit of Russian captain to whom prisoner was given as apprentice and examination of Russian enlistee, despite plain face of return that apprentice swore to U.S. military officer that he was of age).

Courts similarly scrutinized the factual and legal basis for the executive detention of alleged enemy aliens. Again, courts considered additional facts submitted to show there was no lawful basis for the detention. *See, e.g.*, *Wilson v. Izard*, 30 F. Cas. 131, 131-32 (C.C.D. N.Y. 1815) (adjudicating habeas petition by English enlistees who claimed, inter alia, that as "alien enemies" they were ineligible to serve in military, "a fact not appearing on the return, but sworn to at the time of the allowance of the habeas corpus"); *Lockington's Case*, Bright (N.P.) 269 (Pa. 1813) (habeas corpus would issue if a petitioner contested the Government's factual assertions by submitting an "affidavit . . . [stating] that he is not an enemy alien").

In sum, English and American cases from the seventeenth through the nineteenth centuries demonstrate that the writ of habeas corpus functioned as a vigorous and critical limit on non-criminal detentions. Far from considering themselves bound by the four corners of the return, judges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention. Only by providing meaningful review were courts able to protect the integrity of the Great Writ and to prevent the "practice of arbitrary imprisonments, . . . in all ages, the favorite and most formidable instrument[ ] of tyranny." A. Hamilton, Federalist Paper No. 84, in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES 261 (Roy P. Fairfield, ed. 1981).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court exercise jurisdiction over the *habeas corpus* petitions and ensure independent judicial inquiry regarding the factual and legal basis for petitioners' detention.

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but from judicial interpretation of the laws to meet new circumstances, the Suspension Clause inquiry turns on whether *a court's* application of the writ in a new context is tethered to the historical core of habeas corpus, and is therefore constitutionally-protected. Courts are accustomed to this type of inquiry, and can discern whether the existence of habeas jurisdiction in new circumstances falls within the compass of the evolution of habeas principles.

ARGUMENT

I. A Complete Suspension Clause Analysis Focuses On More Than "Absolute Minimum" Protections.

This Court has stated:

> [R]egardless of whether the protection of the Suspension Clause encompasses all cases encompassed by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, *at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'

I.N.S. v. St. Cyr, 533 U.S. 289, 300-01 (2001) (emphasis added; citations omitted) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). This statement that *pre*-1789 law reflected the *absolute minimum* of Suspension Clause protections suggested that *post*-1789 law delineated protections beyond this bare minimum. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) ("*St. Cyr*'s statement that the Suspension Clause protects 'at the absolute minimum' the scope of habeas corpus in 1789 leaves open the possibility that the clause today guarantees jurisdiction over an expanded set of claims based on expanded understandings of substantive constitutional rights.").

Indeed, in *Felker*, the precedent cited in *St. Cyr*, this Court "assume[d] . . . that the Suspension Clause refers to the writ *as it exists today*, rather than as it existed in 1789." 518 U.S. at 663-64 (emphasis added) (citing *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring)).

Despite *St. Cyr* and *Felker*, the D.C. Circuit resolved whether Section 7(a) of the Military Commissions Act of 2006 violates the Suspension Clause by focusing its analysis exclusively on habeas protections *as of 1789*. *Boumediene v. Bush*, 476 F.3d 981, 990-91 (D.C. Cir.) ("We are aware of no case *prior to 1789* going detainees' way, and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military based leased from a foreign government.") (emphasis added), *cert. granted*, 127 S.Ct. 3078 (2007).

In their briefs to this Court, Petitioners and other *amici* show how the D.C. Circuit misapprehended the pre-1789 habeas corpus caselaw. They demonstrate that the court erred in concluding that this caselaw turned on the status of the petitioner, or on the location of the petitioner within sovereign bounds. Their briefs show that throughout its history, the Great Writ protected against the illegal conduct of any agent acting under the Crown's authority, *wherever the jailer operated, and regardless of the detainee's alienage*, arguments that should suffice to resolve the instant case in Petitioners' favor.

Alternatively, the D.C. Circuit's analysis was flawed for a separate reason: It focused exclusively on pre-1789

law. This left its analysis incomplete, and possibly misleading, because this Court's precedents indicate that pre-1789 law only encompasses the writ's constitutional protection at its "absolute minimum." The evolving body of habeas principles *after* 1789 further delienates the scope of the writ's constitutional protection.

In *Felker*, this Court rejected a Suspension Clause challenge to restrictions on the writ of habeas corpus imposed by the AEDPA of 1996. 518 U.S. 651. This Court explained that the restrictions at issue were consistent with the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Id.* at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). The "evolving body of equitable principles" to which *Felker* referred was habeas practice as it had developed in the United States *after 1789*. *See Felker*, 518 U.S. at 664-65 (noting that AEDPA "codifies" pre-existing holdings of the federal courts); *McCleskey*, 499 U.S. at 479-89 (analyzing 19th and 20th century legal developments). *Felker* held that the AEDPA restrictions were valid because they were "well within the compass of [the post-1789] evolutionary process [of habeas corpus practice]." 518 U.S. at 664. *Felker*'s reasoning implies that, just as the "evolving body of equitable principles [of habeas corpus]" in the United States after 1789 shed light on the restrictions to the writ which did not run afoul of the Suspension Clause, this evolution likewise delineated areas of habeas jurisdiction for which restrictions *would* run afoul of the Suspension Clause.

The same inference is implicit in Justice O'Connor's concurrence in *Demore v. Kim*, in which she concluded that habeas suits brought by aliens temporarily detained pending removal were not protected by the Suspension Clause. 538 U.S. 510, 538-40 (2003) (O'Connor, J., concurring). After canvassing *post*-1789 caselaw, she reasoned: "All in all, it appears that in 1789, *and thereafter until very recently*, the writ was not generally available [to persons in petitioners' circumtances]." *Id.* at 539 (emphasis added). Justice O'Connor's reasoning implies that, had history informed her that in 1789 "and thereafter until very recently," the writ *had* issued to aliens temporarily detained pending removal, this would have led her to a *contrary* holding, namely, that the Suspension Clause's protections extended to the petitioners. *Cf.* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 ("the reach of the constitutional guarantee of habeas jurisdiction may simply be a function of historical practice").

A. The Suspension Clause Protects More than the Writ "Known to the Framers": It Encompasses The Historical Core of the Writ's Evolution Since 1789.

It has been said that "the writ protected by the suspension clause is the writ as *known to the framers*, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970) (emphasis added). But

this view that the Suspension Clause only protects the writ "known to the Framers" is not, on balance, persuasive.

First, the Framers must have been aware that the writ as it stood when they drafted the Constitution had itself been the product of considerable development over time. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004) (habeas corpus is "a writ antecedent to statute . . . throwing its root deep into the genius of our common law") (citation omitted); Muhammad Usman Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(D)(1) Violates the Constitution*, 19 St. Thomas U. L. Rev. 361, 366-67 (2006) ("By the time habeas corpus appeared in the Suspension Clause, it had already existed as a common law right for four centuries and as a statutory right for 130 years.").

It is therefore unlikely that the Framers conceived of a writ frozen at a precise point in time -- *e.g.*, 1789 -- and incapable of evolving to meet new circumstances. *See* Henry Paul Monaghan, *Doing Originalism*, 104 Colum. L. Rev. 32, 37 (2004) (noting the writ's "organic" history prior to 1789, and concluding: "because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, [the Framers] did not adopt an institution frozen as of [the date of the Constitution]"). Rather, the Framers envisaged a common law writ which would be "moldable to the exigencies of the times." *Commonwealth ex. rel. Stevens v. Myers*, 419 Pa. 1, 18, 213 A.2d 613, 623 (Pa. 1965) (discussing common law habeas in Pennsylvania).

Second, the Suspension Clause is a unique provision of the Constitution in that it steps back, and pictures our Nation not enjoying "life, liberty and the pursuit of happiness," but, instead, in a different season, enduring the bitter scourges of "Rebellion," or "Invasion." U.S. Const. art. I § 9 cl. 2. The Framers, understandably, did not dwell long on these grim scenarios. *See* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J. 1029, 1041 (2004) (characterizing the Suspension Clause as "a *rudimentary* emergency provision") (emphasis added); *see also* Youngstown *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-650 (1952) ("Aside from suspension of the privilege of the writ of habeas corpus, [the Framers] made no express provision for exercise of extraordinary authority because of a crisis.").

To the limited extent the Framers contemplated a Nation in times of extreme crisis, they viewed the suspension of the writ of habeas corpus as a necessity for such times. *But this recognition of the need for suspension in exceptional times implies the necessity of non-suspension in unexceptional times.* By prohibiting suspension in unexceptional times, the Framers implied that the writ functions in the creation of the "more perfect Union" contemplated by the Constitution – indeed, that it performs an essential purpose. *See, e.g., Daniels v. Allen*, 344 U.S. 443, 448-49 (1953) (Frankfurter, J., concurring) ("It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world."); Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 (the "necessary availability of habeas corpus

review" is implicit in the Constitution's "structure," because it requires courts to determine "whether the Constitution and laws create substantive rights to judicial relief from executive detention") (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953)); David L. Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 Notre Dame L. R. 59, 64 (2006) (concluding that the Suspension Clause contains an "affirmative guarantee" of habeas, in order to achieve the "full realization" of other constitutional guarantees); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* I.N.S. v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 591 (2002) ("the Suspension Clause should be construed in the context of the Constitution of which it forms a part, and not solely by reference to the legal system that preceded the Constitution.").

Third, since 1789, this Court has recognized the availability of habeas jurisdiction in circumstances that the 1789 Congress likely could not even have contemplated. For example, in 1789, no American extradition treaties existed. The first such treaty, the Jay Treaty with Great Britain, took force in 1795, lapsed in 1807; the United States negotiated no new extradition treaty until 1842. Michael Abell & Bruno A. Ristau, *International Legal Assistance* 4 (1995).[2] Yet *In re Kaine*, 55 U.S. 103 (1852)

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[2] Extradition treaties were largely a late nineteenth century development. Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int' L. J. 277, 281 (2002). Congress enacted the first legislation implementing extradition treaties in 1848. *Id.* at 282 n. 27.

inferred from the 1789 Act a jurisdiction to entertain habeas petitions filed by persons detained for extradition. *See Ex Parte Yerger*, 75 U.S. 85, 100 (1868) ("In *Kaine*'s case, all the judges, except one, asserted, directly or indirectly, the jurisdiction of the court to give [habeas] relief"); *see also Collins v. Loisel*, 262 U.S. 426 (1923).

Likewise in immigration cases, this Court has consistently found that alien detainees fall within the compass of habeas jurisdiction. *See, e.g., Ekiu v. United States*, 142 U.S. 651 (1892) (denying writ); *Chin Yow v. United States*, 208 U.S. 8 (1908) (granting writ); *Kwock Jan Fat v. United States*, 253 U.S. 454 (1920) (granting writ). Yet Congress did not pass the first law regulating immigration until 1875, and, consequently, habeas challenges to deportation or exclusion did not begin until the late nineteenth century. *Demore*, 538 U.S. at 538 (O'Connor, J., concurring) ("Because federal immigration laws from 1891 to 1952 made no express provision for judicial review, these challenges took the form of petitions for writs of habeas corpus."). *See* Jonathan L. Hafetz, *Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2536 (1998) (noting the absence of a direct link between the writ's use at common law prior to 1789 and the contemporary deportation cases). Even so, the existence of habeas jurisdiction in immigration cases is now well-established.

The extension of habeas jurisdiction to extradition and immigration contexts exemplifies the writ's capacity to evolve. The cases involved Executive detention, a context

in whic' nabeas protections are at their strongest. *See Rasul* 542 U.S. at 474. They involved aliens, persons protected by the writ since the early days of the Republic. *Id.* at 481 n. 11. The writ achieved its core historic purpose even as it evolved to meet new circumstances.

If, as some claim, the writ "known to the Framers" marks the outer boundaries of Suspension Clause protection, one would expect courts to have made some reference to this constitutional boundary as they extended the writ to new legal contexts, like extradition, or immigration -- contexts unknown to the Framers. *Cf. National Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) (noting that a statute's privacy protection "goes beyond the common law and the Constitution") (citations omitted). The absence of any passing reference to the writ "known to the framers" in habeas contexts like extradition, or immigration, involving no direct link to the pre-1789 model, strongly suggests that the writ "known to the Framers" has not marked the outer boundaries of constitutional protection in the past, and should not do so now.

In sum, the writ that the Suspension Clause contemplates is better described as one grounded in the historical, core purpose of habeas corpus, yet "moldable to the exigencies of the times." *Myers*, 419 Pa. at 18, 213 A.2d at 623. This writ operates in tandem with the evolution of the Constitution, and the Nation. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1509-10 (1987) ("The [Suspension] Clause illustrates yet again the interplay of common law and

constitutional protections of liberty. The common law writ would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement."); *Heikkila v. Barber*, 345 U.S. 229, 608 (1953) (recognizing habeas' historical function in "the enforcement of due process").

B. Petitioners Invoke Habeas Principles At Their Historical Core, and the Suspension Clause Therefore Protects the Federal Courts' Jurisdiction to Hear Their Claims.

Because the Suspension Clause protects the historical core of habeas principles as they evolve to meet new circumstances, the constitutional inquiry here turns on whether Petitioners' circumstances fall within this evolving history. Parsing habeas precedents to identify a historical core might, in some contexts, present "thorny question[s]." *See Demore*, 538 U.S. at 540 (O'Connor, J., concurring). But in the instant case, this inquiry is greatly simplified, because this Court recently held in *Rasul* that habeas jurisdiction extended to alien detainees at Guantanamo -- that is, to persons identically-situated to Petitioners. 542 U.S. 466. The constitutional inquiry can therefore focus on *Rasul*, and turn on whether its jurisdictional holding falls within the historical core of habeas corpus. It does: *Rasul*'s reasoning is firmly grounded in core habeas corpus principles.

Rasul involved a challenge to Executive detention. As the opinion recognized, this implicated habeas "at its historical core," in a context where the writ's protections

were "strongest." 542 U.S. at 474 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and *it is in that context that its protections have been strongest.*") (emphasis added) (citing *St. Cyr*, 533 U.S. at 301).

Rasul, moreover, involved the legality of Executive custody in a context in which military affairs were implicated: the government attempted to justify the detention of persons based on their designation by the military as "enemy combatants." *Rasul*, 542 U.S. at 485. *Rasul* relied on well-established precedent in re-affirming that habeas jurisdiction is available to such persons: "Consistent with the historic purpose of the writ, this Court recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as in times of peace." *Rasul*, 542 U.S. at 475-76 (citing *Ex Parte Milligan*, 4 Wall. 2 (1866), *Ex Parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)); *id.* at 487 (Kennedy, J., concurring) ("there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention where military affairs are implicated"); *accord Ex Parte Endo*, 323 U.S. 283 (1944) (Japanese internment).

Further, *Rasul* relied on the precedents of this Court that have long recognized that habeas jurisdiction extends to persons "confined overseas." *Rasul*, 542 U.S. at 479 (citing *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Hirota v. MacArthur*, 338 U.S. 197, 199 (1948) (Douglas, J.,

concurring)). *Rasul* correctly observed that "[n]othing" in "any" of this Court's precedents "categorically excludes aliens detained in military custody outside the United States from [the] privilege." 542 U.S. at 484. *Rasul* therefore remained well within the compass of habeas principles when it held that the writ reaches persons detained at the U.S. Naval Base at Guantanamo Bay.

In addition, as *Rasul* noted, aliens have been eligible for the writ from the "early years of the Republic." 542 U.S. at 481 n. 11 (collecting cases). Hence, *Rasul*'s conclusion that alien petitioners were eligible for the writ was, again, tethered to the writ's core history.

Finally, *Rasul* pointed out that the detainees' custodian was within the jurisdiction of the court. 542 U.S. at 483-84. This well-established jurisdictional prerequisite of habeas law, *see Rumsfeld v. Padilla*, 542 U.S. 426 (2004), was therefore also satisfied.

The *Rasul* dissent did not attach significance to the many ways, noted above, in which the decision was grounded in well-established habeas principles; instead it sought to erect a "presumption against extraterritorial application" of habeas jurisdiction. 542 U.S. at 488-89 (Scalia, J., dissenting). But this approach incorrectly presumed that strict territorial limits confine habeas jurisdiction, when, in fact, the Constitution commands an expansive protection of the writ.

When it adopted the 1789 Judiciary Act, Congress was "[a]cting under the immediate influence of [the Suspension

Clause's] injunction [and] must have felt, with peculiar force, the obligation of providing efficient means by which this great *constitutional* privilege should receive life and activity." *Ex Parte Bollman*, 4 Cranch 75, 95 (1807) (Marshall, C.J.) (emphasis added). The "peculiar force" Congress "felt" would have been a constitutional obligation to create a writ that would be sufficient to achieve the *full* realization of constitutional guarantees, and to sustain the Republic as it developed. *See* Shapiro, *Habeas Corpus, Suspension and Detention*, 82 Notre Dame L. R. at 64; Fallon & Metzler, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2038 (the "necessary availability" of habeas corpus review is "implicit in the Constitution's structure").

It was not legislative grace that caused Congress in 1789 to enact a writ that was flexible and susceptible to use in wide variety of future challenges to unlawful executive detention. Congress in 1789 was not free to enact a narrow habeas statute. The "peculiar force" of the Constitution compelled Congress to design – and thereafter, to preserve – a statute that was consistent with the commands and goals of the Constitution. *See Ex Parte Lange*, 85 U.S. 163, 166 (1873) (noting that the Court's own authority to issue a writ arose under the 1789 Act and "under the Constitution of the United States"); *see also Rasul*, 542 U.S. at 485-86 (Kennedy, J., concurring) (observing that the scope of habeas jurisdiction should be measured "against the backdrop of the constitutional *command* of the separation of powers") (emphasis added); James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review*

Parity, 92 Colum. L. Rev. 1997, 2062 (1992) (reviewing 19th century habeas precedents and concluding that the 1789 habeas statute gave federal prisoners "a remedy of habeas corpus review of [a variety of] fundamental (typically constitutional) legal claims").

This would explain why, in 1867, when Congress revised the habeas statute in view of implementing the commands of the Fourteenth Amendment, *see* Brennan, *Federal Habeas Corpus*, 7 Utah L. Rev. at 426, it wrote legislation "of the most comprehensive character [that] brought within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws" – creating jurisdiction that would be "impossible to widen." *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1867).

The *Rasul* dissent was mistaken, therefore, when it sought to erect a presumption against the extraterritorial limitation of habeas jurisdiction. If the Constitution mandates a habeas remedy fully capable of protecting fundamental guarantees of liberty, the territorial reach of habeas jurisdiction should extend as far as necessary around the globe to keep pace with potentially illegal Executive detentions. *Compare United States v. Youssef*, 327 F.3d 56, 111 & n. 45 (2d Cir. 2003) (no cases invalidate a federal prosecution on the ground that it exceeded the Constitution's extra-territorial limits) (citing Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1263 n. 12 (1992)); *id.* at 86 ("[i]f it chooses to do so, [Congress] may legislate with respect to

conduct outside the United States, in excess of the limits posed by international law.") (citation omitted), *with* Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L. J. 1497, 1551 (2007) (analyzing recent cases involving assertions of the writ by United States citizens overseas, and concluding that extraterritorial limitations on habeas jurisdiction are increasingly called into doubt, or deemed inapposite). A presumption against extraterritorial application of the writ, moreover, is manifestly ill-suited to the exigencies of a world in the midst of rapid globalization. *Cf.* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The New Yorker, Feb. 14, 2005 (chronicling human rights violations committed overseas by the United States government, with the complicity of foreign governments).

C. The "Ratcheting Up" Critique Of Suspension Clause Protection Is Misplaced.

Some object that the Suspension Clause could not possibly expand to encompass post-1789 developments, because this would mean that habeas protection expands each time Congress adopts a new legal context for the writ, thereby creating a limitless constitutional protection, a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction." *St. Cyr*, 533 U.S. 289, 341-42 (Scalia, J. dissenting); *accord Lindh v. Murphy*, 96 F.3d 856, 868 (7th Cir. 1996) ("Any suggestion that the Suspension Clause forbids every contraction of the powers bestowed [by Congress subsequent to 1789) is untenable.

The Suspension Clause is not a ratchet."), *rev'd on other grounds*, 521 U.S. 320 (1997). Tellingly, however, this "ratcheting up" contention is not based on the actual text of the Clause, or on an explanation of the Framers' intent, but is simply a result-oriented critique of a constitutional protection that seems limitless.

The "ratcheting up" critique raises the concern that every Congressional expansion of the writ might be automatically constitutionalized. But this concern largely falls away once one recognizes that the federal writ of habeas corpus was flexible *as it was first written in 1789*, and has not required much in the way of amendment by Congress. In reality, the evolution of habeas law has been more the work of the courts, not of Congress. *See* Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev.at 170 (emphasis added) (judicial interpretations of statutes, rather than Congressional amendments of these statutes, "more pertinently" explain the writ's expansion). Indeed, the habeas remedy was so broadly written into the first United States Code that, if anything, it has required more judicial containment than expansion. *See Reed v. Farley*, 512 U.S. 339, 356 (1994)(Scalia, J., concurring) ("This Court has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction.").[3]

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[3] To be sure, the 1867 extension of the writ to state prisoners, subject to commitment by state courts, is regarded as a significant expansion of the writ. *See Felker*, 518 U.S. at 659 ("Congress greatly expanded the scope of federal habeas corpus in 1867"). But the true extent of the 1867 expansion remains a matter of controversy. *See* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2096 n. 262 (noting controversy on this point); Gerald L. Neuman,

The instant case involves the application of the writ "at its historical core," *Rasul*, 542 U.S. at 474, to persons detained under *federal* authority, by the *Executive* Branch – a matter plainly encompassed by the 1789 statute, which

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Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 987 (1998) (noting habeas inquiries into "jurisdictional facts" which predated the 1867 Act); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 562-63 (1992) (objecting that the "growth of habeas corpus caused by resistance to the Fugitive Slave Act in the antebellum period" undermines the view that "the issues cognizable in habeas corpus began to expand only after Congress passed the 1867 Act"). Moreover, since state prisoners, from the inception of the Republic, had access to the Supreme Court's appellate jurisdiction, the 1867 Act only hastened their access to relief through habeas corpus, without necessarily expanding their standing to vindicate their rights. *Cf.* James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2062 (1992) (noting state prisoners' access to the Supreme Court via a writ of error under the 1789 Act).

The 1867 amendments can be viewed as part of the natural interplay between the writ and the Constitution, in this instance the Civil War Amendments. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 7.2d, at 378 (5th ed. 2005) (arguing that state prisoners enjoy the habeas right based on the Suspension Clause and the Fourteenth Amendment); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862, 868 (1994) (arguing the same); William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 426 (1961) (Congress broadened habeas corpus in 1867 to broaden understandings of the 14th Amendment). In any event, the 1867 amendments are not directly at issue here.

broadly authorized courts to inquire into the "cause of commitment" of federal prisoners. Act of September 24, 1789, c. 20, s. 14, 1 Stat. 81-82. This mandate proved broad enough to encompass a "wide variety" of inquiries into the legality of confinement, *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004) (citing, *inter alia*, cases involving wartime detention), based on the widest spectrum of sources of law. *See Felker*, 518 U.S. at 659 n.1 (noting that Section 14 of the 1789 Judiciary Act was a "direct ancestor" of the text of a current habeas statute, 28 U.S.C. § 2241, which authorizes inquiry into whether the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States").

The flexibility and continuity of the 1789 statute is evident in *Ex Parte Yerger*, a habeas case in which Congress had deliberately eliminated this Court's jurisdiction, by repealing habeas jurisdiction it had recently conferred. 75 U.S. at 108. Nevertheless, this Court's jurisdiction over the case remained unaffected -- because the repeal did not affect the broad habeas jurisdiction originally conferred in 1789. *See Felker*, 518 U.S. at 659 (explaining *Yerger*); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 Am. U. L. Rev. 497, 526 (1983) (noting that Congress' 1868 repeal of a portion to the 1867 Habeas Corpus Act "[did] no more than return[] the Court's jurisdiction to its earlier status under the Judiciary Act. No new area or subject matter was removed from the scope of the Court's review, and the Court's jurisdiction over the subject matter of habeas corpus remained intact.").

Once one recognizes that it is the Judiciary, not Congress, that has accounted for much of the evolution of habeas law (whether by expansion or contraction), the "ratcheting up" critique falls away, because the Suspension Clause inquiry focuses on whether a *court's* application of habeas jurisdiction in a new context is sufficiently tethered to the "historical core" of habeas precedent to merit constitutional protection. This inquiry into the connection between a given new case and past evolving caselaw is the type of inquiry to which courts are accustomed – as it happens, especially in the habeas context. *See, e.g., Panetti v. Quarterman*, __U.S.__, 127 S.Ct. 2842, 2855 (2007) (habeas petitioner was entitled to relief because the state court's ruling "constituted an unreasonable application of . . . clearly established law as determined by this Court"); *Whorton v. Bockting*, __U.S.__, 127 S.Ct. 1173, 1180 (2007) (to determine whether a habeas petitioner may benefit from the retroactive application of a rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), courts must distinguish between an "old rule" and a "new rule").

The constitutional protection of the Suspension Clause does not expand *ipso facto*, and without limits, each time a federal court finds statutory habeas jurisdiction to exist in a new legal context. Constitutional protection exists only if this new legal context is tethered to habeas' historical core, as reflected in the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Felker*, 518 U.S. at 664. *See also Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting

the need, in constitutional areas, for "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.").

Thus, when, in the past, new limitations on habeas rights took effect, *see, e.g.*, *Stone v. Powell*, 428 U.S. at 518-19 (Brennan, J., dissenting) (arguing that the majority's holding "overruled" prior decisions which had recognized "the unrestricted scope of habeas jurisdiction"); *Williams v. Taylor*, 529 U.S. 362, 387 n. 14 (2000) (opinion of Stevens, J.) (noting that AEDPA "wrought substantial [procedural] changes in habeas law"), these new limitations did not automatically "ratchet down" the scope of constitutionally-protected habeas jurisdiction. The limitations merely signaled that habeas law had changed direction, while remaining within the constitutional compass.

Admittedly, it may sometimes prove difficult to establish whether a habeas principle is deeply-rooted and therefore well-integrated within the fabric of the law. A bright line may not always delineate with exactitude the scope of constitutional protection. *See Demore*, 538 U.S. at 538-40 (2003) (O'Connor, J., concurring) (observing that the degree to which the Constitution protects the writ as it has evolved in immigration caselaw after 1789 presented a "thorny question"); *cf. O'Dell v. Netherland*, 521 U.S. 151, 173 (1997) ("Distinguishing new rules from those that are not under our post-*Teague* jurisprudence is not an easy task.").

But, even if it yielded few bright lines, a test focused on evolving habeas principles is well-suited to the Suspension Clause. First, though the test may be untidy, in actual practice there ought to be few occasions to apply it. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("Only in the rarest circumstances has Congress seen fit to suspend the writ."). Second, it might be desirable for the test to be unclear at its margins. The Framers certainly did not intend to encourage Congress to encroach on the liberties protected by the writ of habeas corpus. A test that left Congress wary of coming close to invading Suspension Clause boundaries would be consistent with the structure of the Constitution. *Cf.* Charles L. Black, Jr., *Law As An Art* in *The Humane Imagination* 17, 33 (1986) (pointing out that "exact definition" is not always desirable in the law, because "exact definition would simply point out ways of immunity, and, to the birds of prey, make the law 'their perch and not their terror.'") (quoting William Shakespeare, *Measure for Measure*, Act 2, Scene 1). Finally, of course, the inquiry remains focused where it should be: on the core values that have animated the writ from the early days of the Republic.

II. CONCLUSION.

For the foregoing reasons, *amicus curiae* Federal Public Defender for the Southern District of Florida request that the Court expand its analytical framework for its Suspension Clause analysis, and reverse the decision below.

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